



[4830-01-p]

DEPARTMENT OF TREASURY

Internal Revenue Service

26 CFR Part 301

[REG-160873-04]

RIN 1545-BF39

American Jobs Creation Act Modifications to Section 6708, Failure to Maintain List of Advisees With Respect to Reportable Transactions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to the penalty under section 6708 of the Internal Revenue Code for failing to make available lists of advisees with respect to reportable transactions. Section 6708 imposes a penalty upon material advisors for the failure to make available to the Secretary, upon written request, lists required by section 6112 within the time prescribed by section 6708(a)(1). These proposed regulations reflect changes to section 6708 made by the American Jobs Creation Act of 2004 and provide guidance regarding the imposition of the section 6708 penalty on material advisors who are required to maintain lists of advisees pursuant to section 6112. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by **[INSERT DATE 90 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Requests to speak and outlines of topics to be discussed at the public hearing

scheduled for July 2, 2013 at 10:00 A.M. must be received by June 10, 2013.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-160873-04), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LDP:PR (REG-160873-04), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-160873-04). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, N.W., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Emily M. Lesniak at (202) 622-4910; concerning submission of comments, the hearing, or to be placed on the building access list to attend the hearing, Oluwafunmilayo (Funmi) Taylor at (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:CAR:MP:T:T:SP, Washington, DC 20224. Comments on

the collection of information should be received by **[INSERT DATE 60 DAYS AFTER PUBLICATION OF THE DOCUMENT IN THE FEDERAL REGISTER]**. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information or of the certification contained under the heading “Special Analyses”;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchases of service to provide information.

The collection of information in this proposed regulation is in §301.6708-1(c)(3)(ii). This information is required for the IRS to determine whether good cause exists to allow a person affected by these regulations an extension of the legislatively established 20-business-day period to furnish a lawfully requested list to the IRS. The collection of information is voluntary to obtain a benefit. The likely respondents are persons (individuals and entities) who qualify as material advisors, as defined in section 6111, who are unable to respond to a valid and statutorily authorized section 6112 list request within the statutory period of time provided by section 6708.

Estimated total annual reporting burden: 200 hours.

Estimated average annual burden hours per respondent: 8 hours.

Estimated number of respondents: 25.

Estimated annual frequency of responses: on occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains proposed amendments to 26 CFR part 301 relating to the section 6708 penalty for failing to make available, as required by section 6112, lists of advisees with respect to reportable transactions. Section 6112 requires material advisors to maintain lists of advisees and other information with respect to reportable transactions and to make that information available to the Secretary upon written request.

Section 6708 was added to the Internal Revenue Code by the Deficit Reduction Act of 1984 (P.L. 98-369, 98 Stat. 680). At that time, section 6708 imposed a penalty on each organizer or seller of a potentially abusive tax shelter who failed to meet the requirements of section 6112 unless the person showed that the failure occurred as a

result of reasonable cause and not as a result of willful neglect. The amount of the penalty was \$50 for each person who was sold an interest in a tax shelter and whose name (or other required information) was not listed or maintained pursuant to the requirements of section 6112. The maximum penalty imposed was \$50,000 for each tax shelter for a calendar year. Treasury Reg. §301.6708-1T was issued shortly after section 6708 became law. Subsequently, the Tax Reform Act of 1986 (Public Law 99-514, 100 Stat. 2090) increased the maximum calendar year penalty to \$100,000.

The American Jobs Creation Act of 2004, Public Law 108-357, 118 Stat. 1418 (AJCA), was enacted on October 22, 2004. AJCA section 817 amended section 6708, significantly increasing the amount of the penalty and eliminating the maximum calendar-year limit on the penalty. As amended by the AJCA, section 6708 imposes a penalty on a person required to maintain a list under section 6112 (a “material advisor”) who fails to make the list available to the IRS upon written request. Under section 6708(a)(1), if a material advisor fails to comply with a written request for the section 6112 list within 20 business days after the request is made, the material advisor is subject to a penalty in the amount of \$10,000 for each day of the failure after the 20th business day. Under section 6708(a)(2), the penalty will not be imposed on any day that the failure is due to reasonable cause. There is no statutory limitation to the amount of the penalty that can be imposed under section 6708. Section 6708(b) provides that the penalty imposed under section 6708(a) shall be in addition to any other penalty provided by law. Section 6708, as amended, is effective for requests made after October 22, 2004, and it encompasses requests made for lists required to

be maintained under section 6112 before section 6112 was amended by the AJCA.

To implement the pertinent provisions of the AJCA, the Treasury Department and IRS issued Notice 2004-80, 2004-2 C.B. 963 (see §601.601(d)(2)(ii)(b)), which provided interim guidance relating to section 6708, as well as section 6112. With respect to section 6708, Notice 2004-80 provides that the 20-business-day period within which a person must provide the list required to be maintained under section 6112 shall begin on the first business day following the earlier of the date that the IRS: (1) mails a request for the list by certified or registered mail to the last known address of the material advisor required to maintain the list; or (2) hand-delivers the written request in person. The Treasury Department and IRS also issued interim guidance relating to section 6112 in Notice 2005-17, 2005-1 C.B. 606; Notice 2005-22, 2005-1 C.B. 756; and Notice 2006-6, 2006-1 C.B. 385. On July 31, 2007, the Treasury Department and IRS issued final regulations under section 6112 (TD 9352) replacing the interim guidance relating to section 6112. The Treasury Department and IRS have received various comments and questions regarding the application of section 6708 as amended by the AJCA. Consequently, after consideration of these comments and questions, the Treasury Department and IRS are publishing proposed rules reflecting the AJCA amendments to section 6708.

Explanation of Provisions

Proposed §301.6708-1(a) provides that, in general, section 6708 imposes a penalty of \$10,000 per day for the failure of a person required to maintain a list under section 6112 to furnish the list to the IRS, upon written request, within 20 business days

after the date of the request, absent reasonable cause.

Proposed §301.6708-1(b) provides that the 20-business-day period begins on the first business day following the earlier of the date that the IRS: (1) mails the request for the section 6112 list by certified or registered mail to the person required to maintain the list; (2) hand delivers the request for the section 6112 list directly to the person; or (3) leaves the request for the section 6112 list at the last and usual place of abode or usual place of business of the person. Proposed §301.6708-1(c) provides that the person may make the requested list available to the IRS as required by section 6112 by delivering it to the IRS by either hand delivery, the U.S. mail, a private delivery service, or by arranging with the IRS to produce the list by another agreed-upon method within the 20-business-day period following the list request.

The Treasury Department and the IRS believe that there are situations in which it is necessary to permit an extension of the 20-business-day response period. Proposed §301.6708-1(c)(3) permits the IRS to grant an extension, at its discretion, if prior to the expiration of the 20-business-day period, the person establishes that the person cannot reasonably meet the 20-business-day deadline despite diligent efforts to maintain the materials constituting a list and to make that list available to the IRS in the time and manner required by the Secretary under section 6112. The proposed regulations explain how to request an extension and discuss the various factors that the IRS will consider in determining whether to grant the person's extension request. The IRS may, in its discretion, grant the person's extension request in full or in part. The failure of the IRS to grant the person's extension request in full or in part may not be reviewed in any

judicial proceeding.

The conference report accompanying the enactment of the AJCA amendments to section 6708 describes the penalty as a “time-sensitive penalty,” and, accordingly, no extensions will be granted where the IRS determines that a significant reason for the extension request is to delay production of the list. See H.R. Rep. No. 108-755, 108th Cong., 2d Sess., at 597. In this regard, §301.6708-1(c)(3)(ii) of the proposed regulations requires persons seeking extensions to affirmatively state that the extension request is not made for purposes of avoiding the person’s list maintenance obligations imposed by section 6112 and its corresponding regulations. The Treasury Department and IRS believe that the time-sensitive nature of the penalty, in addition to the IRS’s need for the section 6112 information in a timely manner, supports the position that extensions, when granted, will generally be granted for a short time period. Persons who are required to maintain a list under section 6112 are required and expected to maintain the list in a readily accessible form. See Treas. Reg. §301.6112-1(d). Accordingly, the Treasury Department and the IRS do not expect that extensions should be routinely requested or granted. The grant of an extension of the 20-business-day response period will be warranted only in situations when the person requesting the extension establishes to the satisfaction of the IRS good cause for why the deadline cannot be reasonably met despite diligent efforts to comply with section 6112. The IRS will adhere to the guidance in these proposed regulations regarding extensions pending the publication of final regulations addressing the matter.

The conference report accompanying the AJCA modifications to the section 6708

penalty provides that the “penalty applies to a person who fails to maintain a list, maintains an incomplete list, or has in fact maintained a list but does not make the list available to the Secretary.” H.R. Rep. No. 108-755, 108th Cong., 2d Sess., at 598. Consistent with the legislative history of the AJCA, a failure to furnish the list that triggers the imposition of the section 6708 penalty may take various forms. Proposed §301.6708-1(d) provides that a failure for purposes of section 6708 includes the failure to furnish a list in a timely manner and in the form required under section 6112 and its corresponding regulations. Regarding the determination of whether the list is furnished in the form required under section 6112 and its corresponding regulations, the Treasury Department and the IRS recognize that they have issued several regulations under section 6112 and that the description of the required contents of a list maintained under section 6112 has varied over time. The Treasury Department and the IRS intend that the description of the contents of the list that is used for purposes of this penalty is the description required by section 6112 (and any corresponding regulations) that was in effect on the date the material advisor’s list preparation and maintenance requirement arose with respect to the reportable transaction.

The IRS will make reasonable efforts to review responses submitted under section 6112 and inform the person of any potential or identified failures in the person’s response on a timely basis. If the person’s response is determined to be incomplete, or untimely, the IRS may impose the section 6708 penalty on a daily basis, consistent with section 6708(a) and proposed §301.6708-1(e). Proposed §301.6708-1(e) provides that the section 6708 penalty accrues on a daily basis, absent reasonable cause, beginning

on the first calendar day after the expiration of the 20-business-day period following a written list request, and continues for each calendar day until, and including, the day the person furnishes a list that complies with the requirements of section 6112 and its corresponding regulations. If the IRS grants an extension of the 20-business-day period, proposed §301.6708-1(e)(2) provides that the section 6708 penalty accrues on a daily basis, absent reasonable cause, beginning on the first calendar day after the expiration of the extension period, and continues each calendar day thereafter until, and including, the day the person furnishes a list that complies with the requirements of section 6112 and its corresponding regulations.

Proposed §301.6708-1(e)(3) provides guidance on the obligations of, and assessment of penalties against, a material advisor when more than one material advisor provided advice on a particular transaction and the material advisors are parties to a designation agreement pursuant to section 6112 and its corresponding regulations.

The section 6708 penalty will not be imposed for any day for which the material advisor establishes that there was reasonable cause for the failure to make the list available. Proposed §§301.6708-1(g) and (h) describe reasonable cause for purposes of the section 6708 penalty. Reasonable cause is determined on a day-by-day and case-by-case basis, taking into account all the relevant facts and circumstances. The material advisor against whom the penalty is imposed has the burden of proving that reasonable cause exists for a specific day or days. Facts and circumstances relevant to a material advisor's reasonable cause for failing to provide the list on a specific day include facts and circumstances arising subsequent to the request for the list and the

material advisor's response to the request. Thus, if the material advisor establishes reasonable cause, the IRS will abate the penalty completely or for the period to which the established reasonable cause relates, which may be for a specific day, days, or the entire period. Proposed §301.6708-1(g)(6) provides examples involving reasonable cause.

Because reasonable cause can be shown to exist in situations involving a variety of facts and circumstances, the proposed regulations include a nonexclusive list of categories of reasonable cause factors that the IRS will consider. Pursuant to proposed §301.6708-1(g)(2), the most important factors in a reasonable cause analysis are those that reflect the extent of the material advisor's good-faith efforts to timely and fully comply with section 6112. Proposed §301.6708-1(g)(3) provides that the exercise of ordinary business care by a material advisor may constitute reasonable cause, but only where the material advisor shows that it took immediate steps to correct any failure upon its discovery. A material advisor's failure to take immediate steps to correct a failure shall be a factor weighing against a finding that the material advisor exercised ordinary business care.

Proposed § 301.6708-1(g)(4) provides that reasonable cause may exist if a failure is due solely to a supervening event, such as illness, theft, fire, flood, storm, or other similar, unexpected event that is beyond the material advisor's control and that prevents the material advisor from making the list available pursuant to the requirements of section 6112.

Proposed §301.6708-1(g)(5) provides that reasonable cause may be established

if the material advisor relied on the advice of an “independent tax professional” as defined in the proposed regulations. The proposed regulations explain that the reliance on an independent tax professional’s advice must be reasonable and in good faith, and will be viewed in light of all the relevant facts and circumstances. In addition to other factors described in the regulations, the advice must be received by the person prior to the time that the list is required to be furnished to the IRS. If the person received advice from an independent tax professional, the person’s reliance on that advice will be considered reasonable only if the independent tax professional expressed a reasonable belief that it is more likely than not that the person is compliant with section 6112 or does not have an obligation imposed by section 6112. Advice from a nonindependent tax professional may be considered in conjunction with all other relevant facts and circumstances but by itself is not sufficient to establish reasonable cause.

Proposed §301.6708-1(h) describes additional reasonable cause factors that are applicable in limited factual circumstances. Proposed §301.6708-1(h)(1) provides that if a material advisor dissolves, is liquidated, or is otherwise no longer in existence, the IRS will consider facts surrounding the winding up of the business of the material advisor as well as any efforts made by the material advisor to comply with section 6112 prior to its dissolution or liquidation when considering whether a successor material advisor has reasonable cause for any failure.

If the material advisor establishes that it acted in good faith (within the meaning of proposed §301.6708-1(g)(2)) in its efforts to fully comply with the requirements of section 6112, the material advisor will have reasonable cause for the days between

when the material advisor provided the list to the IRS and when the IRS reviews the list. If the material advisor does not establish that it acted in good faith, the IRS will not consider the time taken by the IRS to review a list or inform a material advisor of identified failures as a factor in determining whether the material advisor has reasonable cause for that period.

Proposed §301.6708-1(h)(3) provides examples to illustrate when a material advisor has acted in good faith.

Proposed Effective Date

The regulations, as proposed, apply to all written requests made after the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register** for lists required to be maintained under section 6112, including lists persons were required to maintain under section 6112(a) as in effect before October 22, 2004, the date of enactment of the AJCA. The rules in these proposed regulations may be relied upon by persons required to maintain a list under section 6112 regarding list requests made before the publication of the Treasury decision.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a

substantial number of small entities. This certification is based on the fact that the collection of information described above under the heading “Paperwork Reduction Act” only affects persons who qualify as material advisors as defined in section 6111, who are statutorily required by section 6112 to maintain and furnish the underlying documents and information upon which the collection of information is based, and who are unable to meet the section 6708 statutorily provided period of time for furnishing these documents and information. Moreover, requiring those persons to report the information described above imposes only a minimal burden in time or expense. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. Chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and IRS specifically request comments on the clarity of the proposed regulations and on how they can be made easier to understand. All comments submitted by the public will be made available for public inspection and copying.

A public hearing has been scheduled for July 2, 2013, beginning at 10:00 A.M. in the Auditorium (7th Floor) of the Internal Revenue Building, 1111 Constitution Avenue, N.W., Washington, DC. Due to building security procedures, visitors must enter at the

Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the “FOR FURTHER INFORMATION CONTACT” section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments by **[INSERT DATE 90 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]** and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by June 10, 2013. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the schedule of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Lawrence E. Mack, Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301 -- PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 301.6708-1 also issued under 26 U.S.C. 6708 * * *

Par. 2. Section 301.6708-1 is added to read as follows:

§301.6708-1 Failure to maintain lists of advisees with respect to reportable transactions.

(a) In general. Any person who is required to maintain a list under section 6112 who, upon written request for the list, fails to make the list available to the Secretary within 20 business days after the date of the request shall be subject to a penalty in the amount of \$10,000 for each subsequent calendar day on which the person fails to furnish a list containing the information and in the form required by section 6112 and its corresponding regulations. The penalty will not be imposed on any particular day or days for which the person establishes that the failure to comply on that day is due to reasonable cause.

(b) Calculation of the 20-business-day period. The 20-business-day period shall begin on the first business day after the earliest of the date that the IRS –

(1) Mails a request for the list required to be maintained under section 6112(a) by certified or registered mail to the person required to maintain the list;

(2) Hand delivers the written request to the person required to maintain the list; or

(3) Leaves the written request at the last and usual place of abode or usual place of business of the person required to maintain the list.

(c) Making a list available--(1) A person who is required to maintain a list required

by section 6112 may make the list available by mailing or delivering it to the IRS within 20 business days after the date of the list request. Section 7502 and the regulations thereunder shall apply to this section.

(2) A person who is required to maintain a list required by section 6112 may also make the list available to the IRS by making it available for inspection during normal business hours, as provided by section 6112, or by another agreed-upon method, on an agreed upon date that falls within the 20-business-day period following the list request.

(3) Extension. (i) In general. Upon a showing of good cause by the person prior to the expiration of the 20-business-day period following a list request, the IRS may, in its discretion, agree to extend the period within which to make all or part of the list available. For purposes of this paragraph, “good cause” is shown if the person establishes that the 20-business-day deadline cannot reasonably be met despite diligent efforts by the person to maintain the materials constituting a list and to make that list available to the IRS in the time and manner required by the Secretary under section 6112.

(ii) Requesting an extension. Any request for an extension of the 20-business-day period must be made in writing to the person at the IRS who requested the list. The person requesting an extension must briefly describe the information and documents that comprise the list as required by section 6112, explain the circumstances that would warrant additional time, propose a schedule for the completion of the production of the list, state that to the best of the person’s knowledge all information and records relating to the list under the possession, custody, or control of the person have been maintained

in accordance with procedures and policies that are consistent with sections 6001 and 6112 of the Internal Revenue Code, and state that the extension request is not being made for purposes of avoiding the person's list maintenance obligations imposed by section 6112 and its corresponding regulations. The IRS may, in its discretion, grant the person's extension request in full or in part. The IRS will consider whether granting an extension may impair its ability to make a timely assessment against any of the participants in the transaction associated with the requested list. No extensions will be granted if the IRS determines that a significant reason for the extension request is to delay production of the list. The failure of the IRS to grant the person's extension request in full or in part may not be reviewed in any judicial proceeding. A pending extension request by itself does not constitute reasonable cause for purposes of section 6708.

(4) Example. The following example illustrates paragraph (c)(3)(i) and (ii) of this section:

Example. Firm A is a large law firm that is a material advisor. Firm A conducts annual sessions to educate its professionals about reportable transactions and the obligations of the firm related to those reportable transactions. Firm A instructs its professionals to provide information on tax engagements that involve reportable transactions and to provide the documents required to be maintained under section 6112 to Firm A's compliance officer for list maintenance purposes. Firm A's policy provides that, for each engagement involving a reportable transaction, one firm professional will send an email to the firm's compliance officer about the engagement and then direct a subordinate to send the documents required to be maintained to the firm's compliance officer.

Firm A receives a request from the IRS for a section 6112 list. In compiling its list to turn over to the IRS during the 20-business-day period following the list request, Firm A discovers that, with respect to one reportable transaction, a subordinate did not provide the documentation required by Firm A's policy. In addition, Firm A experiences difficulty locating the required documents as both the professional and the subordinate who

worked on the matter are no longer employed by Firm A, requiring the firm to undertake an extensive search of its storage facility for the documents responsive to the list request. Firm A also seeks the materials from the firm's clients, but they are unable to respond timely to the request. Firm A notifies the IRS, in writing, of the difficulties it is experiencing, and provides all other required list information to the IRS, together with a description of the documents that are being searched for at the storage facility, a proposed schedule of production of the documents within 10 business days, and all statements required by these regulations, within the 20-business-day period while it locates the documents for this one engagement.

Under these circumstances, Firm A demonstrated that it could not reasonably make the portion of the list relating to the one engagement, including the documents in the storage facility, available within the 20-business-day period and thus qualified for an extension. Firm A had established procedures reasonably designed and implemented to ensure compliance with the requirements of section 6112. The facts indicate that Firm A made diligent efforts to maintain the materials constituting the list in a readily accessible form and as otherwise required by the Secretary under section 6112. Based on the above, the IRS should grant a 10-business-day extension with respect to the portion of the list including the documents that are located at the storage facility.

(d) Failure to make list available. A failure to make the list available includes any failure to furnish the requested list to the IRS in a timely manner and in the form required under section 6112 and its corresponding regulations. Examples of failures to make a list available include instances in which a person fails to furnish any list; furnishes an incomplete list; or furnishes a list, whether or not complete, after the time required by this section.

(e) Computation of penalty--(1) In general. The penalty imposed by section 6708 accrues daily, beginning on the first calendar day after the expiration of the 20-business-day period following a written list request, and continues for each calendar day thereafter until, and including, the day the person's failure to furnish a list in the form required by section 6112 and its corresponding regulations ends.

(2) Computation of penalty after grant of extension. If the IRS grants an

extension of the 20-business-day period pursuant to paragraph (c)(3) of this section, the penalty imposed by section 6708 accrues daily, beginning on the first calendar day after the expiration of the extension period, and continues for each calendar day thereafter until, and including, the day the person's failure to furnish a list in the form required by section 6112 and its corresponding regulations ends.

(3) Designation agreements and concurrent application of penalty. If material advisors with respect to the same reportable transaction enter into a designation agreement pursuant to section 6112(b)(2) and §301.6112-1(f), separate penalties shall be imposed upon designated material advisors and nondesignated material advisors who are parties to the designation agreement for their respective periods of failure or noncompliance with a list request. A penalty shall continue to accrue against a material advisor who is a party to a designation agreement until such time when a list complying with the requirements of section 6112 and its corresponding regulations is furnished by that material advisor or any other material advisor who is a party to the designation agreement.

(4) Example. The following example illustrates paragraphs (b) through (e) of this section.

Example. The IRS hand delivers a written request for the list required to be maintained under section 6112 to Firm B, a material advisor, on Friday, March 4, 2011. Firm B must make the list available to the IRS on or before Friday, April 1, 2011, the 20th business day after the request was hand delivered. If Firm B fails to make the list available to the IRS by that day, absent reasonable cause or the IRS grant of an extension for the response time, the \$10,000-per-day penalty begins on Saturday, April 2, 2011. The \$10,000 per day penalty will continue for each subsequent calendar day until Firm B makes the complete list available, except for those days for which Firm B demonstrates reasonable cause. If Firm B hand delivers a complete copy of the requested list to the IRS on the morning of Tuesday, April 5, 2011, absent reasonable cause or the IRS prior grant of an extension for the response time, a penalty of \$40,000

will be imposed upon Firm B. See paragraphs (g) and (h) of this section for an explanation of reasonable cause.

(f) Definitions. For purposes of this section, the following definitions apply:

(1) Material advisor means a person described in section 6111 and §301.6111-3(b).

(2) Business day means every calendar day other than a Saturday, Sunday, or legal holiday within the meaning of section 7503.

(3) Reportable transaction means a transaction described in section 6707A(c)(1) and section 1.6011-4(b)(1).

(4) Listed transaction means a transaction described in section 6707A(c)(2) and §1.6011-4(b)(2) of this chapter.

(g) Reasonable cause – general applicability--(1) Overview. The section 6708 penalty will not be imposed for any day or days for which the person shows that the failure to make a complete list available to the IRS was due to reasonable cause. The determination of whether a person had reasonable cause is made on a case-by-case and day-by-day basis, taking into account all the relevant facts and circumstances. Facts and circumstances relevant to a material advisor's reasonable cause for failing to provide the list on a specific day include facts and circumstances arising subsequent to the request for the list. The showing of reasonable cause made by the person should relate to each specific day or days for which the person failed to provide the requested list. Reasonable cause includes, but is not limited to, factors identified in paragraphs (g) and (h) of this section.

(2) Good-faith factors. The most important factors to establish reasonable cause

are those that reflect the extent of the person's good-faith efforts to comply with section 6112. The following factors, which are not exclusive, will be considered in determining whether a person has made a good-faith effort to comply with the requirements of section 6112:

(i) The person's efforts to determine or assess its status as a material advisor as defined by section 6111;

(ii) The person's efforts to determine the information and documentation required to be maintained under section 6112;

(iii) The person's efforts to meet its obligations to maintain a readily-producible list as required by section 6112;

(iv) The person's efforts to make the list available to the IRS within the 20-business-day period (or extended period) following the list request; and

(v) The person's efforts to ensure that the list that is furnished to the IRS is accurate and complete.

(3) Ordinary business care. The exercise of ordinary business care may constitute reasonable cause. To show ordinary business care, the person may, for example, show that it established, and adhered to, procedures reasonably designed and implemented to ensure compliance with the requirements of section 6112. In all instances when ordinary business care is claimed as constituting reasonable cause, a person must show that it took immediate steps to correct any failure relating to the list upon its discovery. The failure of a person to take immediate steps to correct a failure related to the list upon the discovery of the failure shall be a factor weighing against a

conclusion that the person exercised ordinary business care. Notwithstanding the occurrence of an isolated and inadvertent failure, a person still may be able to demonstrate that the person exercised ordinary business care, considering all the relevant facts and circumstances, but only if the person had established and adhered to procedures reasonably designed and implemented to ensure compliance with the requirements of section 6112.

(4) Supervening events. A person may establish reasonable cause for one or more days for which, considering all the relevant facts and circumstances, the failure to timely furnish the list required by section 6112 was due solely to a supervening event beyond the person's control. Events beyond a person's control may include fire, flood, storm, or other casualty; illness; theft; or other similarly unexpected event that damages or impairs the person's relevant business records or system for processing and providing these records, or that affects the person's ability to maintain the section 6112 list or make it available to the IRS. Reasonable cause may be established only for the period that a person who exercised ordinary business care would need to provide the list from alternative records in existence, or make the list available, under the specific facts and circumstances.

(5) Reliance on opinion or advice. (i) In general. A person may rely on the advice of an independent tax professional to establish reasonable cause. The reliance, however, must be reasonable and in good faith, in light of all the other facts and circumstances. For a person to be considered to have relied on the advice, the advice must have been received by the person prior to the date upon which that person would

otherwise have failed to make the list available as required by section 6112 and these regulations. If the person received advice from an independent tax professional, the person's reliance on that advice will be considered reasonable only if the independent tax professional expressed a reasonable belief that it is more likely than not that the person does not have an obligation imposed by section 6112. For example, this advice may conclude that the person is not a material advisor; that the transaction upon which the person provided material aid, assistance, or advice is not a reportable transaction for which a list was required to be maintained as of the date of the advice; that the information and documents to be produced constitute the required list; or that the information or documents withheld by the person are not required to be produced. The advice must also take into account and consider all relevant facts and circumstances, not rely on unreasonable legal or factual assumptions, not rely on or take into account the possibility that a list request may not be made, and not rely on unreasonable representations or statements of the person seeking the advice. Advice from a nonindependent tax professional may be considered in the determination of reasonable cause in light of and in relation to all the other facts and circumstances, but by itself is not sufficient to establish reasonable cause.

(ii) Independent tax professional. For purposes of this section, an independent tax professional is a person who is knowledgeable in the relevant aspects of Federal tax law and who is not a material advisor with respect to the specific transaction that is the subject of the list request. For advice related to a listed transaction, a person who is a material advisor with respect to any transaction that is the same as or substantially

similar to the type of transaction that is the subject of the list request will not be considered an independent tax professional.

(6) Examples. The following examples illustrate this paragraph (g). These examples are intended to illustrate how the facts and circumstances in paragraphs (g)(2) through (g)(5) of this section may apply; however, in any given case, all of the facts and circumstances must be analyzed.

Example 1. On August 11, 2011, the IRS sends a list request via certified mail to Firm C, a material advisor. Firm C consists of a sole practitioner, X, who is away from the office on vacation on this date. X has arranged for a colleague, Y, to review Firm C's mail, email, and telephone messages daily during his absence. X returns to the office the day after his vacation ends, on September 2, 2011, and immediately contacts the IRS to notify it of his absence. Firm C provides a complete list to the IRS on September 19, 2011, 10 business days after he has returned from vacation. Firm C establishes that X was on vacation at the time the list request was sent to Firm C, and Firm C promptly provided the requested list in a manner and time period reflecting ordinary business care and prudence upon X's return to the office. Under these circumstances, Firm C is considered to have made a good-faith effort to comply with the requirements of section 6112. Firm C has established reasonable cause for the entire period between the expiration of the 20-business-day period following the list request and the date the list was provided to the IRS. See paragraphs (g)(2) and (3) of this section.

Example 2. On March 3, 2011, the IRS hand delivers to Firm D, a material advisor, a list request related to a transaction believed by the IRS to have been implemented in November 2008 by a group of Firm D's clients (the advisees). Firm D's involvement in the transaction included implementing the transaction on behalf of some but not all of the advisees. Firm D timely provides the requested list to the IRS. Upon review, the IRS determines that the information provided by Firm D appears to be accurate, but the IRS believes that some of the information is incomplete because it does not contain information about certain individuals who were identified through other investigative means as clients of Firm D who may have engaged in the transaction. In response to a follow-up inquiry by the IRS, Firm D establishes, however, that it is not a material advisor with respect to these taxpayers. Under these circumstances, Firm D has furnished the list as required by section 6112. Because the list was complete when furnished, Firm D need not make a showing of reasonable cause. See paragraph (g)(1) of this section.

Example 3. The IRS sends a list request by certified mail to Firm E, a material

advisor. Firm E maintains the materials responsive to the list request in a CD-ROM format. Under Firm E's established procedures for maintaining section 6112 lists, once the transaction is completed, the documents are scanned and saved to a CD-ROM. After the scanning process is completed, the paper copies of the documents are sent to an off-site storage facility. Three days prior to the 20th business day following the date of the written request, Firm E's office is damaged in a building fire and the CD-ROM is destroyed. Firm E contacts the IRS representative listed as a contact person on the section 6112 list request to advise him that the relevant records were damaged by fire. Under these circumstances, Firm E has reasonable cause for the period of time that Firm E cannot respond to the list request due to circumstances out of Firm E's control. The reasonable cause exception, however, will only be available to Firm E for the period of time that a person who exercises ordinary business care would need to obtain the paper copies of the documents from the off-site storage facility and provide the list to the IRS. See paragraphs (g)(3) and (4) of section.

Example 4. On February 1, 2011, the IRS hand delivers a list request to Firm F, a material advisor. Firm F filed with the IRS the disclosure statement required by section 6111 for the reportable transaction that is the subject of the list request but did not maintain the section 6112 list documentation in a readily accessible format after the filing of the section 6111 statement. On March 2, 2011, the 20th business day after the list request is provided to Firm F, Firm F calls the IRS to ask for additional time to comply with the list request, stating that it could not gather the list information together in 20 business days. Because Firm F is not able to show that it made diligent efforts to maintain the materials constituting the list in a readily accessible form, the IRS should not grant Firm F an extension of time. See paragraph (c)(3) of this section. Further, Firm F does not have reasonable cause because it has demonstrated a lack of a good faith effort to comply with the requirements of section 6112 and a lack of ordinary business care. See paragraphs (g)(2) and (3) of this section.

Example 5. On August 11, 2011, the IRS sends a list request, via certified mail, to Firm G, a material advisor. Firm G, consisting of a sole practitioner, P, maintains the materials responsive to the list request in a CD-ROM format. Generally, once the transaction is completed, the documents are scanned and then saved to a CD-ROM. The hard copies of the documents are sent to off-site storage. P is aware of the list request but ignores it. On September 22, 2011, the 13th calendar day after the 20-business-day period following the list request, P suffers a temporary but debilitating illness that lasts 22 days. Following the illness, P immediately returns to work. After returning to work, P continues to ignore the list request. In this situation, the facts and circumstances indicate that Firm G does not have reasonable cause for any day in which there was a failure to make the list available to the IRS, because the failure was not due solely to the supervening event occurring on September 22, 2011, that lasts for 22 days. Firm G did not make a good-faith effort to make the list available to the IRS prior to the occurrence of the supervening event. Firm G is liable for the \$10,000 per day penalty from the first day following the expiration of the 20-business-day period until

a complete list is provided to the IRS. See paragraphs (g)(2) and (4) of this section.

Example 6. On August 11, 2011, the IRS sends a list request, via certified mail, to Firm H, a material advisor. Firm H, consisting of a sole practitioner, P, maintains the materials responsive to the list request in a CD-ROM format. Generally, once the transaction is completed, the documents are scanned and then saved to a CD-ROM. The hard copies of the documents are sent to off-site storage. P is aware of the list request and begins compiling the documents to respond to the IRS within the 20-business-day period ending on September 9, 2011. Prior to responding to the list request, P suffers a temporary but debilitating illness on September 3, 2011, that lasts through September 20, 2011. Upon returning to work on September 21, 2011, P contacts the IRS to explain that P experienced a temporary but debilitating illness from September 3, 2011, through September 20, 2011, and that P has returned to the office and intends to provide the list response to the IRS within a short period of time. Firm H provides the list response to the IRS on September 23, 2011. In this situation, the facts and circumstances indicate that Firm H has reasonable cause for the period from September 10, 2011 until September 23, 2011, attributable to P's illness. The failure to furnish the list in a timely fashion was solely attributable to the supervening event occurring on September 3, 2011, and Firm H promptly provided the requested list in a manner and time period reflecting ordinary business care upon P's return to the office. Firm H is considered to have made a good-faith effort to comply with the requirements of section 6112. Firm H has established reasonable cause for the entire period between the expiration of the 20-business-day period following the list request and the date the list was provided to the IRS. See paragraphs (g)(2) and (4) of this section.

Example 7. Firm I receives a list request for transactions that are the same or substantially similar to the listed transaction described in Notice 2002-21, 2002-1 C.B. 730. Firm I will be considered a material advisor with respect to a particular transaction for which it provided advice if the transaction is the same as or substantially similar to the transaction described in Notice 2002-21. Firm I, however, is unsure whether the transaction is the same as or substantially similar to the transaction described in Notice 2002-21. Therefore, Firm I seeks an opinion from Firm L, a law firm, on this issue. P, a partner in Firm L, provided tax advice to clients who invested in other Notice 2002-21 transactions regarding reporting the purported tax benefits on their income tax returns, and Firm L is a material advisor with respect to those transactions. Because Firm L is a material advisor with respect to the type of transaction that is the same as or substantially similar to the transaction described in Notice 2002-21, Firm L is not considered an independent tax professional. Therefore, Firm I cannot rely on advice provided by Firm L to establish reasonable cause under this section. The IRS may consider Firm L's advice in the determination of reasonable cause in light of other facts and circumstances, but Firm's L's advice is not sufficient to establish reasonable cause independently. See paragraph (g)(5) of this section.

Example 8. Firm J, a law firm, provides advice to various clients of the firm

regarding the potential tax benefits of a reportable transaction under §1.6011-4(b)(5) of this chapter (involving a section 165 loss) and is a material advisor with respect to the transaction. Firm J also provides advice to Firm M, an accounting firm, regarding the same transaction. Firm M then advises various Firm M clients regarding this same transaction, and is a material advisor. The transaction is not a listed transaction. Firm N, a law firm that is not associated with Firm J and has not provided advice with respect to the same transaction to Firm M, has provided advice to its own clients regarding other transactions subject to § 1.6011-4(b)(5) of this chapter, but not the particular transaction that was the subject of Firm J's advice to Firm M. The IRS hand delivers a list request to Firm M, the subject of which is the transaction regarding which Firm J provided advice to Firm M. At a point prior to the expiration of the 20-business-day period, Firm M seeks advice from Firm J and Firm N about the propriety of withholding certain documents related to the transaction. Because Firm J provided advice with respect to the particular transaction that is the subject of the list request, Firm J is not an independent tax professional. Although Firm N has provided advice on a transaction that is considered a reportable transaction under §1.6011-4(b)(5) of this chapter, Firm N is considered to be an independent tax professional, because Firm N did not provide material assistance with respect to the particular transaction that is the subject of the list request. See paragraph (g)(5) of this section.

(h) Reasonable cause – special considerations --(1) Material advisor no longer in existence. If a material advisor has dissolved, been liquidated, or otherwise is no longer in existence, the person required by section 6112 to maintain the list (the “responsible person”) is subject to the penalty for failing to make the list available. In considering whether a responsible person or successor in interest has reasonable cause for any failure to timely make the list available to the IRS, the IRS will consider all of the facts and circumstances, including those facts and circumstances relating to the dissolution, liquidation, and winding up of the business of the original material advisor, and any efforts made by the original material advisor to comply with the requirements of section 6112 prior to the dissolution or liquidation. When appropriate or applicable, due diligence, if any, performed by a responsible person or successor in interest will be considered, and due consideration will be given for acts taken by that person to

minimize the potential for violation of the section 6112 requirements.

(2) Review by IRS. Whether reasonable cause exists for a period of time will be determined based on all the relevant facts and circumstances, including facts and circumstances arising subsequent to the request for the list. If a material advisor establishes that it acted in good faith, as defined in paragraph (g)(2) of this section, in its efforts to comply with the provisions of section 6112 and its corresponding regulations, the material advisor will be deemed to have reasonable cause for the periods of time taken by the IRS to review a furnished list for compliance with the requirements of section 6112 and to inform the material advisor of any identified failures in the list. If the material advisor does not establish that it acted in good faith, the IRS will not consider the time taken by the IRS to review a list or inform a material advisor of identified failures as a factor in determining whether the material advisor has reasonable cause for that period.

(3) Examples. The following examples illustrate paragraph (h)(2) of this section.

Example 1. On February 1, 2011, the IRS hand delivers a list request to Firm O, a material advisor. On March 2, 2011, the 20th business day after the list request is delivered to Firm O, Firm O sends a list to the IRS that was contemporaneously prepared after the issuance of advice with respect to the reportable transaction and continuously maintained in accordance with the requirements of section 6112 and the related regulations. Prior to sending the list, a supervisor at Firm O carefully reviewed the list to verify that it was comprehensive and accurate. The IRS completes its review on March 22, 2011, and determines that the list is not complete because O furnished a draft copy of the tax opinion, rather than the final document as the final document had been mistakenly misfiled. After Firm O is notified of the missing information, Firm O immediately furnishes a complete copy of the final version of the tax opinion. Firm O made a good-faith effort to comply with the requirements of section 6112, including its efforts to ensure that the list that was furnished to the IRS was accurate and complete. Firm O has reasonable cause for the entire period between the expiration of the 20-business-day period following the list request and the date the complete list was provided to the IRS.

Example 2. On February 1, 2011, the IRS hand delivers a list request to Firm P, a material advisor. Firm P's involvement in the reportable transaction included implementing the transaction on behalf of some but not all of Firm P's clients. On March 2, 2011, the 20th business day after the list request is delivered to Firm P, Firm P sends the list to the IRS. The IRS completes its review on March 22, 2011. The IRS believes the client list is incomplete because it does not contain information about certain individuals who were identified through other investigative means as clients of Firm P who may have engaged in the transaction. On March 25, 2011, in response to a follow-up inquiry by the IRS, Firm P establishes that it is not a material advisor with respect to these taxpayers. Therefore, the March 2, 2011 list was complete and accurate. Under these circumstances, Firm P has timely furnished the list as required by section 6112. Because Firm P complied with the requirements of section 6112, Firm P does not need to establish reasonable cause for the period from March 3, 2011, through March 25, 2011.

Example 3. On February 1, 2011, the IRS hand delivers a list request to Firm Q, a material advisor. On March 2, 2011, the 20th business day after the list request is delivered to Firm Q, Firm Q sends the list to the IRS. Firm Q had not maintained a list contemporaneously after the issuance of advice with respect to the reportable transaction, and during the 20 business days prior to providing the list to the IRS, Firm Q created the list. To meet the 20-business-day deadline, a supervisor did not review the final list prior to sending the list to the IRS. The IRS completes its review on March 22, 2011, and determines that the list is not complete because the list does not include 15 persons for whom Firm Q acted as a material advisor with respect to the reportable transaction. Firm Q provides the additional information on March 25, 2011. Because Firm Q is not able to show that it made diligent efforts to maintain the materials constituting the list in a readily accessible form and that it made a reasonable effort to ensure that the list that was furnished to the IRS was accurate and complete, Firm Q cannot establish that it exhibited a good faith effort to comply with the requirements of section 6112. Firm Q does not have reasonable cause for the failure to furnish the complete list from March 3, 2011, through March 25, 2011.

Example 4. Within the 20-business-day period following a list request, Firm R sends four boxes of documents comprising the required list to the IRS using a commercial delivery service. The IRS receives only three of the boxes because Box 4 was erroneously self-addressed using Firm R's office address. Box 4 arrives at Firm R's office on January 6, 2012, the 22nd business day after the list request was made. Firm R immediately recognizes its clerical error, promptly contacts the IRS, and resends the original and unopened Box 4, properly addressed, to the IRS together with documentation supporting the error. The IRS receives Box 4 on January 9, 2012. Under these circumstances, Firm R has reasonable cause for the late delivery of Box 4, because it made a good-faith attempt to timely comply with the list request and immediately corrected an inadvertent error upon its discovery. As a result, no penalty

will be imposed based on the delay in providing Box 4. If, after inspection, the IRS determines that the list is incomplete or defective, even with the contents of Box 4, Firm R must establish reasonable cause for the incomplete nature of the list or the defect to avoid imposition of a penalty for the period beginning January 5, 2012, until the day that a complete list is provided by Firm R.

(i) Effective/applicability date. This section applies to all requests for lists required to be maintained under section 6112, including lists persons were required to maintain under section 6112(a) as in effect before October 22, 2004, made on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Steven T. Miller

Deputy Commissioner for Services and Enforcement.

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